

**Midwestern Distribution Services, Inc. and Delbert W. Heath. Case 17-CA-9917**

July 6, 1981

**DECISION AND ORDER**

Upon a charge filed on September 15, 1980, by Delbert W. Heath, an Individual, and duly served on Midwestern Distribution Services, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint on October 31, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file an answer to the complaint.

On March 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, On March 27, 1981, the Board issued an order transferring the proceeding to the Board and Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent failed to file a response to the Notice To Show Cause and therefore the allegations of the Motion for Summary Judgment stand uncontroverted.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

Section 102.20 of the Board's Rules and Regulations provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing specifically states that unless an answer to the complaint is filed within 10 days from the service thereof, "all

of the allegations contained in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." As of the date of filing of the Motion for Summary Judgment, no answer had been filed by Respondent.<sup>1</sup> Furthermore, Respondent has failed to file a response to the Notice To Show Cause in which it could have attempted to explain its failure to answer.

In view of Respondent's failure to answer, and no good or other cause having been shown therefore, the uncontroverted allegations of the complaint are deemed admitted and found to be true in accordance with the rule set forth above. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF RESPONDENT**

Respondent, a New Jersey corporation, at all times material herein has maintained its principal office and place of business at 806 Genessee, Kansas City, Missouri, where it has engaged in the transportation and delivery of merchandise. Respondent's Kansas City place of business is its only facility involved in this proceeding. In the 12 months preceding issuance of the complaint, Respondent, in the course of its business operations within the State of Missouri, sold goods and services valued in excess of \$50,000 directly to customers located outside the State of Missouri, and sold goods and services valued in excess of \$50,000 to customers located within the State of Missouri who in turn satisfy the Board's direct jurisdictional standards. Respondent, also, in the 12 months preceding the issuance of the complaint, in the course and conduct of furnishing transportation of commodities in interstate commerce or functioning as an essential link in the transportation of commodities in interstate commerce, derived gross revenues in excess of \$50,000, and, in the course and conduct of functioning as a link in the interstate transportation of commodities, derived gross revenues in excess of \$50,000, and provided services valued in excess of \$50,000 to firms which satisfy the Board's direct jurisdictional standards.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within

<sup>1</sup> On February 12 and March 11, 1981, the General Counsel mailed letters to Respondent informing it of the requirement to file an answer, and on the latter date also served a copy of the March 11 letter and a copy of the complaint on Respondent. The March 11 letter extended the time to answer to March 18, 1981. On March 16, Respondent's attorney acknowledged receipt of the complaint and urged that summary judgment be entered. No answer was filed.

the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

Allied Services Division, Brotherhood of Railway and Airline Clerks, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

At all times material herein, Respondent and the Union have maintained in effect and enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of certain employees of Respondent at Respondent's Kansas City terminal. On or about June 14, 1980, Respondent's employee, Delbert Heath, claimed that Respondent was not paying its dock employees the correct wage and was not paying its truckdrivers for showup time, both in violation of the collective-bargaining agreement. On or about June 21, 1980, Respondent, acting through M. L. Starnes, at the terminal, threatened to lay off Heath because of his support for the Union and because of his claims made on or about June 14 that Respondent was violating the collective-bargaining agreement. On or about June 29, 1980, Respondent laid off Heath because Heath had claimed that Respondent had violated the collective-bargaining agreement and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection. On or about August 26, 1980, Respondent recalled Heath. On or about August 28, 1980, Heath stated that he would file a grievance with the Union because Respondent was not following seniority in assigning work in accordance with the collective-bargaining agreement. On or about September 8, 1980, Respondent discharged Heath and since that date has failed and refused to reinstate Heath to his former position of employment because Heath had on or about June 14, 1980, made claims that Respondent was acting in violation of the collective-bargaining agreement, and on or about August 28, 1980, stated that he would file a grievance with the Union because Respondent was not following seniority in assigning work in accordance with the collective-bargaining agreement, and in order to discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection.

Accordingly, we find that, by Respondent's conduct on or about June 21, 1980, of threatening to lay off Heath, Respondent has interfered with, re-

strained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and that, by such conduct, Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act. We also find that, by Respondent's conduct on or about June 29, 1980, of laying off Heath, and by its conduct on or about August 28, 1980, of discharging Heath, and since that date failing and refusing to reinstate Heath to his former position of employment, Respondent has discriminated, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Midwestern Distribution Services, Inc., set forth in section III, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily laid off and then, after recall, terminated the employment of Delbert Heath, we shall order Respondent to offer to Heath immediate and full reinstatement to his former job, or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and to make him whole for any loss of earnings he may have suffered because of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned from the date of his layoff to this recall and from the date of his termination to the date of Respondent's offer of reinstatement, less any net interim earnings. Such backpay shall be computed, with interest thereon, in the manner set forth in *F. W. Woolworth Company*, 90

NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>2</sup>

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. *Midwestern Distribution System, Inc.*, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. *Allied Services Division, Brotherhood of Railway and Airline Clerks, AFL-CIO*, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the acts described in section III, above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, *Midwestern Distribution Services, Inc.*, Kansas City, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with lay off for making claims that it is acting in violation of the collective-bargaining agreement between the Respondent and *Allied Services Division, Brotherhood of Railway and Airline Clerks, AFL-CIO*.

(b) Discouraging membership in, or activities on behalf of *Allied Services Division, Brotherhood of Railway and Airline Clerks, AFL-CIO*, by its employees, or by otherwise discriminating in regard to the hire or tenure of any of its employees because they make a claim that Respondent is acting in violation of the collective-bargaining agreement between Respondent and the above-mentioned Union, or state their intention to file a grievance with this Union claiming that Respondent was acting in violation of the collective-bargaining agreement, or by otherwise discriminating in regard to the hire or tenure of any of its employees because they join or assist the Union, or engage in other concerted activity for the purpose of collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the ex-

ercise of the rights guaranteed them in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer *Delbert Heath* immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him, in the manner set forth in the section entitled "The Remedy."

(b) Post at its place of business in Kansas City, Missouri, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>3</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT threaten our employees with lay off for making claims that we are acting in violation of the collective-bargaining agreement between us and *Allied Services Division*,

<sup>2</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on backpay due based on the formula set forth therein.

Brotherhood of Railway and Airline Clerks, AFL-CIO.

WE WILL NOT discourage membership in, or activities on behalf of Allied Services Division, Brotherhood of Railway and Airline Clerks, AFL-CIO, by our employees by discriminatorily discharging or laying off our employees, or by otherwise discriminating in regard to the hire or tenure of any of our employees because they make a claim that we are acting in violation of the collective-bargaining agreement between us and Allied Services Division, Brotherhood of Railway and Airline Clerks, AFL-CIO, or state their intention to file a grievance with the above-mentioned Union claiming that we were acting in violation of the above-mentioned collective-bargaining agreement, or by otherwise discriminating in regard to the hire or tenure of any of our employees because

they join or assist the above-named Union, or engaged in other concerted activity for the purpose of collective bargaining or mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Delbert Heath immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him, plus interest.

MIDWESTERN DISTRIBUTION SERVICES, INC.